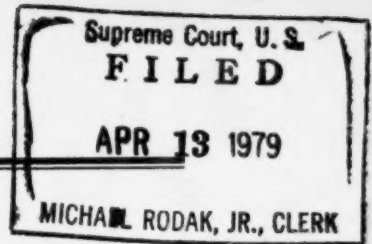


78-1566



In the
Supreme Court of the United States

October Term, 1978

No.

LONG'S HAULING COMPANY, INC., a corporation,
Petitioner,

v.

HARRY HUGE, C. W. DAVIS and PAUL R. DEAN,
As Trustees of the United Mine Workers of America
Health and Retirement Funds,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. McLEAN, JR.

R. A. KING

BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER

57th Floor—600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 562-8800

Counsel for Petitioner

Of Counsel:

MELVIN L. MOSER, JR.

BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER

57th Floor—600 Grant Street
Pittsburgh, Pennsylvania 15219

Date: April 13, 1979

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HARRY HUGE, C. W. DAVIS and PAUL R. DEAN,
As Trustees of the United Mine Workers of America
Health and Retirement Funds,Respondents.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

The petitioner, Long's Hauling Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 14, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 590 F.2d 457 and is reproduced in the Appendix. The opinion of the United States District Court for the Western District of Pennsylvania, which only one Judge of the Court of Appeals approved, is reported at 442 F.Supp. 1041 and is reproduced in the Appendix.¹

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 14, 1978. A timely petition for rehearing and suggestion of rehearing in banc was denied on January 17, 1979, and this petition for certiorari was filed within ninety days

1. The Order of the District Court also appears in the Appendix.

of that date.² This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

An employer enters into a labor agreement with the recognized bargaining agent of its employees. The agreement requires the employer to make payments into private health, welfare and retirement funds. During the term of that agreement, the employer is forced, in violation of the terms of the initial agreement as well as federal antitrust and labor law, to sign a national labor agreement which requires payments to national health and welfare funds. Thereafter, the employer, its employees, and their recognized bargaining agent, agree to and do abide by their initial agreement, including continued employer

2. The Judgment of the Court of Appeals and its Order denying rehearing are reproduced in the Appendix.

payments into the private funds. It is urged that this Court grant certiorari and decide the following question:

Where an employer has a labor agreement requiring it to pay into private funds, which it does, but is coerced during the term of its pre-existing agreement into signing a national labor agreement which requires payments into national funds, is the employer entitled to raise antitrust and labor law violations as defenses to the validity of the national agreement in a suit brought to compel payments into the national funds by trustees who are alleged parties to the said violations?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

"Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 8(d) of the National Labor Relations Act (NLRA) as amended, 29 U.S.C. §158(d), provides in pertinent part:

"Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification

sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ."

Section 8(e) of the NLRA, as amended, 29 U.S.C. §158(e), provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or

agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . ."

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in District Court

Defendant Long's Hauling Company, Inc. (Long) is a trucking concern engaged in the business of transporting coal in Western Pennsylvania (R.4-5). Long's employees are members of Local 8857, District 5 of the United Mine Workers of America (UMW) (R.90,99).

Plaintiffs are Trustees of the UMW Health and Retirement Funds (Funds)³ (R.4). Plaintiffs brought

3. The "Funds" consist of the 1950 Pension Trust, 1950 Benefit Plan and Trust, 1974 Pension Trust, and 1974 Benefit Plan and Trust (R.4).

this action under §301 of the National Labor-Management Relations Act, as amended (NLRA) to compel Long to make royalty payments to the Funds in accordance with the National Bituminous Coal Wage Agreement of 1974 (1974 National Agreement) (R.4-6). See 29 U.S.C. §185. Long defended on the ground that District Court enforcement of the 1974 National Agreement would countenance conduct violative of Section 1 of the Sherman Act, and on the ground that the 1974 National Agreement was unenforceable and void because of the UMW's violations of sections 8(d) and 8(e) of the NLRA as well as the UMW's breach of its pre-existing labor agreement with Long (R.21-23). See, 15 U.S.C. §1 29 U.S.C. §158. A counterclaim was also asserted against the plaintiffs for illegal conduct under Section 1 of the Sherman Act (R.24-26). See, 15 U.S.C. §1.

B. Statement of Facts

Long and the UMW have entered into a number of different labor agreements since 1962 (R.22,207). These agreements were often patterned after the National Agreement in effect between the UMW and the Bituminous Coal Operators Association (BCOA), (32a), even though Long is not a member of this association. National and international representatives of the UMW did not participate in negotiations (R.91). Long's labor agreements have historically been the result of direct negotiation between Long and the UMW Local (R. 67,94,32a).

Every one of the labor agreements negotiated by Long and the Local has provided for a private health, welfare and retirement fund. The agreements specifically deleted the welfare and retirement clauses of the UMW's National Agreement (32a). Long makes periodic payments to this private fund and its employees are eligible for health and pension benefits from the fund (R.86-88). Long's employees have

individually and through the Local indicated that their agreed-upon private fund is preferable to participation in the UMW Funds (R.19,85).⁴

In January of 1975, Long's drivers were engaged in hauling clean coal from a mine in Indiana, Pennsylvania for the Barnes & Tucker Coal Company (Barnes & Tucker) (R.71-72). Long began hauling coal on a daily basis for Barnes & Tucker in 1973 (R.72). Barnes & Tucker is signatory to the 1974 National Agreement (33a).

Long had a valid labor agreement with the UMW that covered the period May, 1974 to May, 1976 (R.70-72). Nonetheless, in late January, 1975, Long's drivers were stopped and accosted on a public road outside the Barnes & Tucker mine by 10 UMW representatives (R.72-74,108,124-125). Notwithstanding the labor

4. On November 9, 1976, Long's employees withdrew a grievance in exchange for Long's agreement to continue paying into the private funds (R.19).

agreement that was already in effect, Long's drivers were told that they were "not hauling no coal out of here . . . because Long's Hauling Company has no contract with United Mine Workers."(R.73).

Unsatisfied with the drivers' response, the UMW representatives contacted Long's offices (R.73). Long's president was told that there would be no coal hauling unless Long signed the 1974 National Agreement (R.108). The UMW representatives did not immediately succeed in obtaining Long's signature on the 1974 National Agreement, and 50 of Long's trucks were forced to make the 100 mile trip home empty (R.74,108).

Long's drivers were again stopped and threatened at the Barnes & Tucker mine on February 4, 1975 (R.108-110). The drivers pointed out that 50 trucks would be idled if the UMW again halted the transportation of coal (R.75). UMW representatives persisted in their threats that Long would not be

permitted to haul coal until it signed the 1974 National Agreement (R.75,109,125). Faced with severe economic pressure and no reasonable alternative, Long succumbed (R.109). To remain in the coal transportation business, Long signed the 1974 National Agreement under duress on February 4, 1975 (R.109,181).

The labor agreement that was already in effect with the UMW when Long was forced to sign the 1974 National Agreement requires a 60 day notice by any party that desires termination (R.36-37,204-205). The District Court found as a fact that Long never received any notice of termination from the UMW (33a).

In pertinent part, Article II of the 1974 National Agreement provides:

The transportation of coal as defined in paragraph (a) may be contracted out only to a contractor employing members of the UMWA

under this Agreement and only where contracting out such work is consistent with the prior practice and custom of the Employer (R.131).⁵

The UMW's purpose in forcing Long to sign the 1974 National Agreement was to enforce Article II by restricting subcontracts for the transportation of coal to signatories of that Agreement (33a). Long has alleged that the plaintiff-trustees were parties to a conspiracy to enforce the restrictions of Article II and the lower courts have assumed this allegation to be true (31a).

From the date of signing, Long never considered that Agreement a true "agreement" (R.129). As a matter of fact, Long and the Local continued their history of direct bargaining. Long and its drivers are

5. This section of the 1974 National Agreement has been held to be illegal. UMW, Local 1854 (Amax Coal Co.), 238 NLRB No. 214 (1978). It is also the subject of a class action antitrust suit filed in the District Court for the Western District of Pennsylvania. Feather et al. v. UMWA et al., C.A. No. 76-955 (W.D. Pa.).

currently operating under a labor agreement that was negotiated after the 1974 National Agreement was signed (R.18,71,84,99-100,186). A UMW representative from District 5 participated in the negotiations that led to this current agreement (R.81). The current agreement became effective on May 1, 1976 and renders inapplicable the health and welfare clauses of the 1974 Agreement (R.18). To the present, Long's employees have been covered by their private pension plans (R.18,49).

As found by the District Court, Plaintiff-trustees and the UMW ignored the 1974 National Agreement until this action was filed in March of 1977, even though a District 5 representative of the UMW took part in the 1976 negotiations that led to Long's current labor agreement (R.81,34a). Long's employees never received UMW cards evidencing eligibility for benefits under the funds (R.89). Neither have they

received any other notice of eligibility or coverage from plaintiffs or the UMW (R.89). Yet plaintiffs now seek to compel the payment of royalties for every hour Long's men have worked since Long was forced to sign the 1974 National Agreement in February of 1975 (R.6).⁶

REASONS FOR GRANTING THE WRIT

This case presents a direct conflict between two fundamental policies that underlie the development of federal law. One is the protection of employees who are beneficiaries of health and welfare funds. This Court has expressed its concern that such beneficiaries be protected from losses resulting from

6. The net effect of the trustees prevailing is the new requirement that Long's employees work a minimum of ten years under an agreement requiring payment into the national funds in order to receive any benefits from said funds (R.58-59).

union or employer conduct. Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960).

The second is the attainment of desirable performance in our economy through antitrust laws that achieve and maintain competition by imposing a code of fair dealing in business. These laws protect firms victimized by a union's unjustified exercise of economic power to impose direct restraints on business markets. E.g., Connell Co. v. Plumbers and Steamfitters, 421 U.S. 616 (1975). They also preclude judicial recognition of a contract which would work to enforce the precise conduct that is illegal under antitrust law. Kelly v. Kosuga, 358 U.S. 516, 520-21 (1959); Bruce's Juices, Inc. v. Am. Can Co., 330 U.S. 743, 775 (1947); Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 262-263 (1909).

The antitrust defense is permitted without regard to the interests of the individual parties in order to further the underlying policy of protecting the

public against dishonest transactions. Continental Wall Paper Co., supra at 262. This same policy supports the allowance of labor law defenses to the validity of an entire contract.

Before this case, courts had permitted an employer to raise defenses showing that no agreement was intended or consummated by the parties, despite the potential conflict with the policy of protecting employee beneficiaries. Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), cert. denied, 369 U.S. 873 (1962); Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962). Indeed, a majority of the judges of the Third Circuit panel recognized that the precedents of this Court did not preclude consideration of the antitrust defense. 590 F.2d at 462 n.1, 467 (10a,18a-19a). However, Judge Adams while approving these precedents, voted to affirm the decision of the District Court on the basis of a completely new rule of

federal common law which would eliminate any defenses an employer may even arguably have to the validity of a collective bargaining agreement at issue, in a suit by trustees of health and welfare funds. 590 F.2d at 463 (11a). This new rule of law is based on far-reaching policy considerations that underlie Benedict Coal.

Review by this Court is accordingly needed to settle the important issue of the extent to which the policy of protecting welfare and pension funds will foreclose employers from asserting defenses to the validity of an entire labor agreement which they would otherwise have, based upon the precedents of this Court that recognize the best way to secure the public from dishonest transactions is by the courts not aiding in making illegal agreements effective.

I.

The Decisions Below Are In Direct Conflict With
Holdings Of This Court And Lower Courts.

In Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227 (1909), this Court held that in contract actions where the judgment of the Court would result in making effective illegal agreements that constitute the forbidden combination under the Sherman Act, a defendant could assert the antitrust violation as a defense. Until the instant decision of the Third Circuit, this principle of law remained inviolate.⁷ The application of this principle has been limited only by the policy of preventing people from

7. See, Kelly v. Kosuga, 358 U.S. 516, 520-21 (1959); Bruce's Juices, Inc. v. Am. Can Co., 330 U.S. 743, 775 (1947); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314, 317-320 (5th Cir. 1974); cert. denied, 419 U.S. 1050 (1974). Farbenfabriken-Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962); cert. denied, 372 U.S. 929 (1963); Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960), rev'd. on other grounds 365 U.S. 320 (1961); But see, Pennington v. UMWA, 325 F.2d 804, 819 (6th Cir. 1963) (dictum), rev'd. as to other portions, 381 U.S. 657 (1965).

getting other people's property for nothing and the reluctance of the courts to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act since that law already provides a powerful private remedy. Kelly v. Kosuga, 358 U.S. 516, 519-21 (1959).

A majority of the Third Circuit panel which heard this case recognized that the policies articulated in Kosuga would not preclude consideration of Long's antitrust defense since (1) the agreement requiring payments into the national funds was extracted from Long without granting it a quid pro quo, (2) Long's success on this defense would not permit it to secure the benefits of a labor agreement while circumventing the burdens, and (3) Long has paid into the private funds for its employees in accordance with the requirements of its employees as freely negotiated with their recognized bargaining agent, both before and after the conduct which forms the basis for the antitrust defense.

Nevertheless, in order to form a majority decision for affirmance of the District Court, the Third Circuit engrafted an additional limitation on the availability of the antitrust defense in suits by trustees of health and welfare funds which effectively destroys the defense and makes the courts partners in validating the agreement forbidden by the Sherman Act, directly contrary to the precedents of this Court and other lower courts. Such additional limitation is premised on Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960), and Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968) as well as their underlying policy of protecting health and welfare funds.

In neither Benedict nor Seanor did the employer have a plausible argument that the whole collective bargaining agreement was invalid. In both cases, it was evident that if the employers were successful, they would be able to avoid paying their employees

part of the compensation for which they had rendered services under an admittedly valid contract. Moreover, in neither case was there any allegation of wrongdoing on the part of the trustees. Without these circumstances, the policy of protecting the interests of beneficiaries of health and welfare funds prevailed. This policy has not however prevented other courts from permitting employers to raise against trustees, defenses relating to the non-existence of a valid contract. Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), cert. denied 369 U.S. 873 (1962); Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962).

Yet, the Third Circuit has pushed this policy to its extreme and has effectively insulated the trustees, who are parties to the illegal conspiracy, from even those defenses which call into question the validity of the contract upon which the trustees have brought suit. Such a protectionist attitude which gives

virtually no consideration to the public's interest in competition and its right to be protected from dishonest transactions, requires this Court to delineate the proper balance which must be struck between the competing policies which have collided in order to guide the lower courts in formulating federal law and applying the precedents of this Court.

II.

THE AVAILABILITY OF LABOR LAW DEFENSES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Lower courts have often considered the merits of an alleged union unfair labor practice, irrespective of the fact that trustee actions to enforce labor agreements were brought long after the six month

period of limitations contained in the NLRA.⁸ Indeed, a §8(e) violation has been successfully asserted as a defense against trustees seeking to compel fringe benefit payments under a labor agreement that effectively prohibited subcontracting to delinquent employers. Waggoner v. R. McGray, Inc., 432 F.Supp. 580,582 (C.D. Calif. 1977).

This Court has held that federal courts have jurisdiction over union unfair labor practices which also constitute a breach of a labor agreement. Arnold Co. v. Carpenters, 417 U.S. 12 (1974). This Court has also held that federal courts may consider "labor law questions that emerge as collateral issues in suits brought under independent federal remedies". Connell

8. Lewis v. Quality Coal Corp., 270 F.2d 140, 142-43 (7th Cir, 1959), cert. denied, 361 U.S. 929 (1960); Lewis v. Mill Ridge Coals, Inc., 188 F. Supp. 4, 7-8 (E.D.Ky. 1960), aff'd. 298 F.2d 552,553 (6th Cir. 1962); Waggoner v. R. McGray, Inc., 432 F. Supp. 580,582 (C.D. Calif. 1977); Lewis v. Kearns, 175 F. Supp. 115, 119-20 (S.D. Ind. 1959).

Co. v. Plumbers and Steamfitters, 421 U.S. 616,626 (1975). However, the question of whether labor law violations, which do not constitute a breach of contract, may be asserted as a defense to the validity of an entire labor agreement, has not been settled by this Court.⁹

Federal Courts have been charged with the duty of fashioning and applying a body of substantive federal law in order to effectuate our national labor policy. Textile Workers Union v. Lincoln Mills, 353 U.S. 448,456-57 (1957). This question goes to the very heart of our national labor policy. A finding that Long can assert unfair labor practices as a defense to the validity of an entire labor agreement would certainly promote the congressional policy underlying §8(e) and

9. See, Sears Roebuck & Co. v. San Diego City, ETC., 436 U.S. 180 (1978) for a recent analysis of the pre-emption doctrine.

§8(d) of the NLRA. A contrary holding undermines that policy, as well as the general policy of protecting and securing the public from illegal agreements. By denying labor law defenses, the federal courts become parties to enforcing agreements that spring from a violation of federal law. That cannot be part of our national labor policy.

The labor law defenses Long asserts, go to the very issue of whether it owes any obligation at all to the plaintiffs, this Court should definitively hold that such defenses are available for the same reasons it permits an antitrust defense. Settling this important question of federal law will provide the lower courts with guidance as to when and under what circumstances they can consider labor law violations so that our national labor policy will be fulfilled and carried out uniformly.

CONCLUSION

Long's petition presents this Court with the opportunity to balance and reconcile federal antitrust policy with the policy of protecting employee welfare funds. It also provides an opportunity to offer guidance to lower courts in developing federal substantive labor law. For all of the reasons described above, we respectfully request that a writ of certiorari issue to review the judgment and opinion of the Third Circuit.

April 13, 1979

Respectfully Submitted,

John J. McLean, Jr.
R. A. King
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
57th Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 562-8800
Counsel for Petitioner

Of Counsel:

Melvin L. Moser, Jr.
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
57th Floor - 600 Grant Street
Pittsburgh, Pennsylvania 15219

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—
No. 78-1060
—

HARRY HUGE, C. W. DAVIS, and PAUL R. DEAN, as
Trustees of the United Mine Workers of America
Health and Retirement Funds,
Appellees,

v.

LONG'S HAULING COMPANY, INC.,
Appellant.

—
ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(Civ. No. 77-269, W.D. Pa.)
—

Argued September 5, 1978

Before SEITZ, *Chief Judge*, ADAMS and ROSEN, *Circuit Judges*.

(Opinion filed December 14, 1978)
—

Jack W. Plowman, Esq.
Plowman and Spiegel
Pittsburgh, Pa.
Counsel for Appellees

John J. McLean, Jr., Esq.
R. A. King, Esq.
Melvin L. Moser, Jr., Esq.
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
Pittsburgh, Pa.
Counsel for Appellant

OPINION

SEITZ, *Chief Judge*, announcing the judgment of the Court.

Defendant Long's Hauling Company (Long) appeals from a preliminary injunction granted to the trustees of the United Mine Workers of America Health and Retirement Funds. *See Huge v. Long's Hauling Co.*, 442 F. Supp. 1041 (W.D. Pa. 1977). The trustees brought this suit under section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, to enforce an alleged contractual obligation to make payments to the Health and Retirement Funds. Counterclaims filed by Long remain pending in the district court.

I

For several years prior to 1975, Long, an independent hauler of coal, had collective bargaining agreements with the United Mine Workers of America (UMW). The parties usually patterned their agreements on the national contracts between the UMW and the Bituminous Coal Operators Association (BCOA). Traditionally, however, the UMW's agreement with Long allowed Long to make payments to private health and pension funds rather than the national funds maintained by the UMW.

In 1974, Long and the UMW entered into a contract that was to extend into 1976. As under prior agreements, Long was to pay into its private funds. The contract also called for 60-days notice prior to cancellation by either party. In the same year that Long signed this agreement, the UMW and the BCOA consummated the National Bituminous Coal Wage Agreement of 1974. Article II of the national agreement dealt with contracts for transportation:

The transportation of coal as defined in paragraph (a) may be contracted out only to a contractor employing members of the UMWA under this Agreement

In early 1975 UMW organizers began to stop Long's trucks as they attempted to enter mines operating under the national agreement. The drivers were told that Long had no agreement with the UMW. Upon contacting union officials, Long learned that the UMW would continue to stop Long's trucks until Long signed an agreement identical in all respects to the national contract. Succumbing to this pressure, Long signed such an agreement on February 4, 1975.

The new contract did not exempt Long from making payments to the national funds. Nevertheless, Long continued to pay into its private funds, and made no payments into the UMW's funds. On March 14, 1977, the trustees of the UMW funds filed this suit to collect back payments and to compel future payments. Long filed counterclaims for damages against the trustees for alleged violations of the labor and antitrust laws. These counterclaims remain pending in the district court.

II

On appeal Long argues that the district court erred in entering a preliminary injunction in favor of the trustees. Long first asserts that Article II of the national agreement violates the Sherman Act and renders the entire contract unenforceable. Second, Long disclaims liability to the trustees because the UMW's tactics and Article II itself allegedly violate section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158.

A.

Long would interpose the UMW's alleged violation of the Sherman Act as a defense against its promise to pay into the UMW funds. At common law a promisor could assert against a third-party beneficiary any defense he could assert against the original promisee. *See Restatement of the Law of Contracts* § 140 (1932). Nevertheless, courts have been extremely reluctant to recognize any de-

fense to an employer's promise to pay into a pension fund. The trustees of the fund, although technically third-party beneficiaries, often can avoid contractual defenses that could be asserted against the union itself. See *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

Drawing on *Benedict Coal*, courts have denied employers a variety of defenses whenever the royalties sought by the trustees were payable for coal already mined. See, e.g., *Pennington v. United Mine Workers of America*, 325 F.2d 804 (6th Cir. 1963), *rev'd as to other portions*, 381 U.S. 657 (1965); *Boyle v. North Atlantic Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971). As this court has noted, such payments "have the characteristics of compensation to the employees for services they have already rendered." *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). In this case, however, the trustees seek to enforce Long's promise prospectively as well as retrospectively. Courts have not explored the boundaries of *Benedict Coal* where the trustees wish to compel future payment of royalties as yet unearned. Nor do the facts before us raise this issue, since Long's antitrust defense is insufficient under established precedent.

In declining to consider Long's antitrust defense to the trustees' request for a preliminary injunction the district court relied exclusively on this court's opinion in *Lewis v. Seanor Coal Co.*, *supra*. *Seanor's* facts are strikingly similar to those presented by the instant case. Additionally, its analysis of the antitrust issue would seem to dispose of Long's appeal. Nevertheless, because some of *Seanor's* broad statements may be dicta, Long's arguments merit a fresh analysis of the rules and policies at stake.

The Supreme Court has not favored antitrust-based defenses to otherwise valid contracts. In *Kelly v. Kosuga*, 358 U.S. 516 (1959), the Court laid out the policies underlying close circumscription of such defenses. Most importantly, the Sherman Act already provides for a powerful private remedy: an action for three times the damages

caused by a violation. Because of this express remedy, "the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act." *Id.* at 519.

Furthermore, by allowing one party to avoid its obligations under a contract, the courts may create more inequities than they remedy. In the words of Mr. Justice Holmes, courts must be wary to prevent people "from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (dissenting opinion), *quoted in Kelly v. Kosuga, supra*, at 520-21.

Here, these two policies militate against allowing Long an antitrust defense at this point. Most significantly, the district court expressly preserved Long's right to press its counterclaim and to seek treble damages against the offending parties, including the UMW. See 442 F. Supp. at 1044. Given the posture of this action, an antitrust defense would be both misdirected and statutorily unjustifiable in light of *Kosuga's* first admonition. Additionally, allowing such a defense against the trustees may create unforeseeable inequities. Although Long has paid into private funds, health and pension plans are not fungible. It is impossible to gauge the effect of substituting one plan for another. Were such a defense granted here, this court would be hard-pressed to deny it to any employer who had signed an agreement containing Article II, especially if that employer offered some semblance of an alternative plan. Such a result would be totally inconsistent with *Kosuga*.

Long asserts that *Kosuga*, while refusing to grant an antitrust defense on its facts, approved such a defense whenever a judgment in favor of liability would enforce "the precise conduct made unlawful by the [Sherman] Act" *Kelly v. Kosuga, supra*, at 520. But by removing this statement from its context Long disserves the need for restraint stressed by the Supreme Court throughout the opinion. Were a court to recognize an antitrust defense

whenever failure to grant such a defense would ratify the contract, the exception would swallow *Kosuga's* rule. *Seanor* rejected such an interpretation of *Kosuga*; it should be rejected again in this case.

Kelly v. Kosuga will not support an antitrust defense where trustees seek a preliminary injunction enforcing a contractual obligation to make payments into welfare and pension funds. As already noted, Long's counterclaim challenging the legality of Article II is still pending against the trustees. Should this claim succeed, the trustees' right to prospective payments under the contract could depend upon a number of factors, including the severability of Article II from the rest of the contract. This appeal, of course, does not present those issues. The district court did not err in denying Long an antitrust defense against the trustees' request for a preliminary injunction.

B.

Long claims that the UMW engaged in unfair labor practices by ignoring the extant contract between Long and its employees and by pressuring Long to sign a new agreement. In addition, Long asserts that Article II is a "hot cargo" clause proscribed by section 8(e) of the NLRA. The district court refused to allow Long to interpose these allegations as a defense to the trustees' suit.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that courts must defer to the National Labor Relations Board whenever an activity is even "arguably subject" to section 8 of the NLRA. Long admits that its allegations are within the ambit of section 8. Nevertheless, Long asserts, the Supreme Court has recognized two exceptions to *Garmon*, either of which would allow the district court to consider its defenses.

First, Long argues that *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975), established the authority of the courts to hear "labor law

questions that emerge as collateral issues" in antitrust suits. *Id.* at 626. Long again reads the Supreme Court's precedents too loosely. In *Connell* plaintiff claimed that certain picketing violated the Sherman Act. In defense, the union initially contended that section 8(e) of the NLRA authorized such conduct and overrode the earlier-enacted Sherman Act. Even if section 8(e) did not endorse such activity, the union argued, the NLRB had exclusive remedial jurisdiction over all actions arguably governed by section 8.

In reaching the merits of *Connell's* antitrust claim, the Supreme Court rejected both of these threshold arguments. The NLRB's jurisdiction over violations of section 8 did not displace the federal courts' jurisdiction over antitrust violations, even though the same conduct could be both an illegal restraint of trade and an unfair labor practice. Furthermore, the courts can resolve "collateral" issues of labor law when such resolution is necessary to grant relief under an independent federal remedy like the Sherman Act.

Connell clearly allows Long to prosecute its antitrust claim even though Article II may also violate section 8(e). *Connell* does not, however, grant the federal courts jurisdiction concurrent with that of the NLRB to remedy violations of section 8. Long's antitrust allegations, discussed above, are completely severable from its labor allegations. Resolution of the former does not require determination of the latter. The rule that Long seeks would allow any plaintiff to bootstrap itself into a position to litigate in district court claims within the NLRB's primary jurisdiction simply by adding unrelated antitrust allegations. This would go far beyond the holding in *Connell*.

Alternatively, Long suggests that *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974), creates a special exception to *Garmon* for contractual actions brought under section 301 of the LMRA. In *Arnold* an employer brought an action under section 301, alleging breach of a no-strike clause. The union sought to deprive

the district court of jurisdiction by arguing that its alleged breach also would constitute an unfair labor practice. The Court held that, in a section 301 action, where the offending activity constitutes both a breach of contract and an unfair labor practice, the courts may determine the contractual claim.

Like *Connell, Arnold* is properly distinguishable from the present case. Although Long alleges that the UMW's conduct both breached the contract and constituted unfair labor practices, *Lewis v. Benedict Coal Corp.*, *supra*, clearly indicates that the trustees are entitled to Long's payment despite contractual breaches by the UMW. Long's only cause of action for breach of contract lies against the UMW, not the trustees. One lower court seems to have allowed a case like this to proceed, but that court did not expressly consider the jurisdictional issue. See *Waggoner v. R. McGray, Inc.*, 432 F. Supp. 580 (C.D. Cal. 1977).

Under *Garmon*, Long's allegations of unfair labor practices and violations of section 8(e) were not proper defenses before the district court.

III

The district court did not err in declining to consider either the antitrust counterclaim or the labor counterclaim in defense to the trustees' request for a preliminary injunction. The counterclaims presumably will be resolved at some later date, at which time the district court can consider whether the UMW itself is an indispensable party to such claims. The order of the district court will be affirmed.

ADAMS, *Circuit Judge*, concurring.

As I see it, this appeal primarily presents the issue whether, when the trustees of union welfare and pension funds sue to compel an employer to make payments to the

funds pursuant to the terms of a labor agreement between the employer and the union, the employer may defend on the ground that union misconduct excused its obligation to perform. Specifically, Long's Hauling Company (Long) raises the defenses of antitrust illegality and labor law violations on the part of the United Mine Workers of America in opposition to a claim by the trustees of that union's health and retirement funds that Long has undertaken to contribute to the funds by signing the 1974 National Agreement.

Long contends, first, that the Union violated the anti-trust law in coercing it to assume that obligation. It avers that United Mine Workers representatives prevented its trucks from hauling coal from a mine that was operated by a party to the 1974 National Agreement and threatened to disrupt Long's business with the mining company in the future unless Long signed the National Agreement. The UMW was capable of enforcing its threats, Long alleges, since a clause in the National Agreement prohibited signatories from contracting the handling of coal to a trucker that is not a party to the National Agreement. Long insists that the clause in question is an illegal restraint of trade under section 1 of the Sherman Act, and that as a result of such restraint, it was compelled to sign the National Agreement. Second, Long argues that the clause constituted an unfair labor practice and a "hot cargo" clause in violation of sections 8(d) and 8(e), respectively, of the National Labor Relations Act and that consequently the entire National Agreement was void, including the provisions covering employer contributions to the union's health and retirement funds.

The district court held that it could not consider the merits of Long's antitrust defense and that it did not have jurisdiction over the labor law defenses, and issued a preliminary injunction ordering Long to contribute to the funds. This Court now affirms the judgment of the trial court. I agree with Chief Judge Seitz that the federal courts do not have jurisdiction to entertain Long's unfair

labor practice and "hot cargo" clause defenses; as to these matters, the National Labor Relations Board has original jurisdiction. However, because I would take a different route from Chief Judge Seitz in disposing of Long's antitrust illegality defense, I write this separate opinion.

Evidently, Chief Judge Seitz would permit employers generally to interpose defenses to suits by union pension fund trustees to compel payments to the fund. But he relies on *Kelly v. Kosuga*, 358 U.S. 516 (1959), to conclude that a court may not consider an antitrust violation that was entered as a defense to such suit. In my view, denial of Long's defense on the authority of *Kosuga* would invite further wasteful and fruitless litigation by employers who wish to avoid their contractual obligations to contribute to union welfare and pension funds. Inasmuch as the Supreme Court has, to this date, left open the possibility that under certain circumstances a charge of antitrust illegality may properly be entertained as a defense to a contract claim, *see id.* at 520, employers in the future may still attempt to bring themselves within that exception.¹

1. Moreover, although I do not dwell on the point because of the approach I take in disposing of this case, I note in passing that the policies articulated in *Kosuga* do not appear to preclude consideration of Long's antitrust defense. *Kosuga* concerned the more common factual context of a party that had already performed under a contract suing for payment due, and a defendant seeking to avoid payment by contending that the contract abridges the antitrust law. As Chief Judge Seitz observes, *Kosuga* reflects the policies, first, of not permitting a defendant to be unjustly enriched by receiving benefits under the contract while being exempted from performing in return, and second, of not disproportionately penalizing the plaintiff where the antitrust laws already specify a powerful private remedy. *See generally*, Comment, *The Defense of Antitrust Illegality in Contract Actions*, 27 U. Chi. L. Rev. 758 (1960). Neither of these policies, however, appear to be applicable to this case, inasmuch as the UMW apparently extracted Long's undertaking to make payments to its pension fund without granting it a quid pro quo, and inasmuch as Long continues to make payments for the benefit of its employees to a private pension fund pursuant to the terms of its contract with the local union. It would seem, therefore, that the situation in this case may be analogized to those in which defendants in a contract suit have been permitted to interpose the defense of antitrust illegality, under the exception left open by *Kosuga*. *See, e.g.*, *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962); *cert. denied*, 372 U.S. 929 (1963); *Tampa Electric Co. v. Nashville Coal Co.*, 276 F.2d 766 (6th Cir. 1960), *rev'd on other grounds*, 365 U.S. 320 (1961). *See also* *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 646 n.3 (1977) (Stevens, J., dissenting) and cases cited therein. *But see* *Pennington v. United Mine Workers of America*, 325 F.2d 804, 818 (6th Cir. 1963), *rev'd as to other portions*, 381 U.S. 657 (1965).

And defenses by employers on grounds other than antitrust illegality would not be precluded at all. Because I believe it desirable to have a clear rule that would foreclose such litigation altogether,² I prefer to rest affirmance of the district court judgment on the ground that where the trustees of a union welfare or pension fund sue to compel an employer to make contributions as stipulated in the labor contract between the employer and the union, the employer may not assert *any* defenses that he may arguably have to that contract.

My analysis begins with *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). In *Benedict*, the trustees of a union pension fund sued a coal operator to collect royalties due the fund under the collective bargaining agreement between the union and the employer. The coal operator contended that under contract rules concerning third-party beneficiaries, it should be permitted to set off against its liability to the fund damages incurred when the union engaged in strikes and work stoppages in contravention of its contractual promises.

This argument was rejected by the Supreme Court, which refused to treat labor agreement provisions stipulating that an employer make payments to a union pension fund as a typical third-party beneficiary contract. It regarded the employer's contributions to the fund as "really another form of compensation to the employees," and deduced that, "as such, the obligation to pay royalty might be thought to be incorporated into the individual employment contracts."³ The Supreme Court also noted that national labor policy, out of "solicitude for the union members, because they might have little opportunity to prevent the union from committing actionable wrongs," does not permit recourse against anyone but the union to recover

2. In addition to the policy reasons for such a rule, developed *infra*, it deserves mentioning that frequent litigation of such disputes would have a deleterious effect upon the pension funds, in that counsel fees for the trustees would have to be paid from their accounts, and may affect the ability of the funds to provide the benefits they were designed to provide.

3. 361 U.S. at 469.

damages for injuries inflicted by that entity. In the Court's view, this policy applies "with even greater force to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents"⁴ These and other related considerations⁵ influenced the Supreme Court to adopt a rule different from that of general contract law by exercising the federal judiciary's authority to fashion federal common law for the enforcement of collective bargaining agreements. It held that the parties to such agreements "must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund. . . ."⁶

Lower federal courts have recognized that the Supreme Court's discussion in *Benedict* evinces a considered judgment that the ramifications for national labor policies must be surveyed before labor agreements pertaining to employer contributions to union welfare and pension funds are subjected to contract principles governing third-party beneficiary situations.⁷ Accordingly, attention has been given to the concerns expressed in *Benedict* in cases raising issues other than the narrow question decided by the Supreme

4. *Id.* at 470.

5. Two additional factors were mentioned by the Supreme Court. Though more closely connected to the discrete issue raised in *Benedict*—whether a contract rule of construction for interpreting the intent of the parties should be applied to a labor agreement—than are the two general considerations highlighted in the text, they, too, are noteworthy. The Court observed that, "[i]n a very real sense *Benedict's* interests in the soundness of the fund and its management is in no way less than that of the promisee union" since "[i]t is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death." 361 U.S. at 468-69. The Court also deemed relevant the fact that the agreement was industry-wide, and that it was doubtful that the other coal operators had intended to assume the risk of being pressured to increase their contributions in the event that one or more of their co-signatories were absolved because of union strikes and work stoppages.

6. 361 U.S. at 471.

7. *See, e.g.,* *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962) ("The Supreme Court has now placed collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts.")

Court of how the intent of the parties to a labor agreement should be construed. Almost invariably, when faced with a suit to compel employer payments to union welfare or pension funds, the courts have disallowed defenses sought to be interposed by employers to enforcement of the contract based on such grounds as failure of consideration, existence of parol evidence to establish a different agreement, fraud, misrepresentation, and duress on the part of the union.⁸ Indeed, circumstances similar to those presented here formed the backdrop for the Sixth Circuit's opinion in *Pennington v. United Mine Workers of America*, 325 F.2d 804 (6th Cir. 1963), *rev'd as to other portions*, 381 U.S. 657 (1965). In that case, an employer refused to make payments to the union's pension fund on the ground that it had been coerced into signing the labor agreement under threats of violence, as part of a combination among the union and several large coal companies that violated the Sherman Act. After discussing alternative grounds for affirming the district court's holding in favor of the trustees, the court of appeals relied on *Benedict* to conclude that, "with respect to the coal already mined and the rights accrued thereby, we are of the opinion that the Trustees' right to recover is not barred." *Id.* at 819. The approach taken in *Benedict* and the subsequent decisions appears

8. *See, e.g.,* *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Boyle v. North Atlantic Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971); *Lewis v. Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir.), *cert. denied*, 390 U.S. 947 (1967); *Lewis v. Harecliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965).

The one situation where courts have been reluctant to apply the rationale of *Benedict* as fully as they might have is in permitting an employer to show by parol evidence that no agreement at all was intended by the parties. *See, Lewis v. Mears*, 297 F.2d 101 (3d Cir.), *cert. denied*, 369 U.S. 873 (1962) (but petition for rehearing denied by equally divided court, with published dissent); *Lewis v. Lowry*, 295 F.2d 197 (4th Cir. 1961), *cert. denied* 368 U.S. 977 (1962) (with Sobeloff, Chief Judge, dissenting). To the extent these decisions are consistent with the prevailing trend of judicial opinion, they might be explained as recognizing that whereas it is reasonable to demand in other circumstances that the employer initiate suit if it wishes to be absolved from liability, it is unreasonable to expect that it do so where it believes that both it and the union had no intent to create a binding agreement. In the latter situation, the employer should not be expected to know that a potential adversary exists or that it is jeopardizing the expectations of its employees.

effectively to dispose of Long's defense of antitrust illegality.

The wisdom of not permitting employers such as Long to interpose defenses to their undertaking to support union welfare and pension funds seems apparent. With both the number of Americans in retirement and the duration of those non-remunerated years of their lives increasing, and with the cost of health care soaring, it has become ever more important to provide for those situations where the cost of living will no longer be satisfied from anticipated income. Social security benefits are often insufficient by themselves to meet those needs, and must be supplemented from other sources. For millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment, and old age has been the union welfare and pension funds. Under such arrangements, the employer contributes periodically to the funds an amount negotiated by contract. Such contributions are, in reality, indirect or deferred compensation, earned by the employee with each hour or each day worked. Ensuring the viability of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government,⁹ and has recently received renewed attention.¹⁰

As *Benedict* makes clear, insulation of the employer's obligations to union welfare and pension funds from defenses that the employer otherwise may assert to its agreement to perform under the labor contract serves vital public interests. It prevents penalizing employees for alleged union misdeeds over which they have little, if any, control.

9. See, e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, repealing Welfare and Pension Plans Disclosure Act of 1959, as amended in 1962, 29 U.S.C. §§ 301 *et seq.*

10. On July 12, 1978, Executive Order No. 12071 was promulgated, establishing an eleven-member Commission on Pension Policy to examine public and private pension systems and to suggest reforms, as part of an effort to develop national policies for disability, survivor, and retirement programs. 47 U.S.L.W. 2052 (July 25, 1978).

And it guarantees hard-working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment.¹¹

Moreover, such a rule forces an employer to disclose promptly any problems that may exist in its undertaking to provide for its employees' health and retirement needs, rather than create false impressions in the minds of its employees regarding the compensation they are entitled to receive. It thus forecloses the possibility that an employer will surprise its employees by revealing at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future. The employer may still have its claims adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, antitrust damages, or a declaration that an unfair labor practice has been committed, as the case may be. It would be discouraged, however, from biding its time in such a way as to jeopardize the future security of its employees.

Finally, it appears preferable as a matter of judicial administration to require that the employer sue the union directly if it believes it has reason to be excused from performing under the labor agreement, instead of permitting it to assert its claim by way of defense against the trustees. The employer dealt with the union and bases its case on those dealings. Clearly, the enforceability of the labor agreement can better be ascertained in the context of a lawsuit to which the principal actors are parties than in one where one party, the trustees, does not have first-hand knowledge of the material facts.¹²

11. Also, there is always the danger that while the defense to the trustees' suit is being litigated, the employer may become financially pressed and unable to make payments, and the employees would then be without any recourse.

12. Chief Judge Seitz agrees that the rule laid down by *Benedict* and subsequent cases requires that Long pay the amounts already owed to the health and retirement funds, but believes that the trustees' request that Long be compelled to make future payments as they become due may be subject to different treatment. In view of the far-reaching policy considerations—elaborated upon in the text—that underlie the *Benedict* rule, no practical purpose

I recognize that Long is in a more appealing position than the typical employer seeking to avoid its contractual duty to contribute to a pension fund, because Long continues to make payments to a private fund pursuant to a separate agreement with the local union. But that would not appear to justify a departure from a clear and consistent rule barring employer defenses to suits by pension fund trustees. The risks that the important interests of the employees will be eroded by exceptions to the rule and that the rule itself would eventually become emasculated outweigh the equities that favor even an employer with the most sympathetic position.¹³ As against the risks that are entailed in complicating a simple, workable rule by engrafting case-by-case exceptions upon it, the employer suffers no real harm: It remains free to initiate suit against the union to excuse its performance under the labor agreement, and is forewarned by the rule's absolute application that until it prevails in such lawsuit it will be held to its undertaking to contribute to the union's welfare and pension funds.

ROSENN, *Circuit Judge*, dissenting.

I respectfully dissent from the opinions of the majority.

Although those opinions briefly set forth the facts of this controversy, I believe that further amplification will help to put the case in perspective. The district court

found as a fact that since 1962 the employees of Long's Hauling Company, Inc., ("Long") have been represented in collective bargaining by the United Mine Workers of America ("UMW") and by District 5 of that union (sometimes jointly referred to herein as the "Union"). During this period, Long and District 5 have negotiated several collective bargaining agreements. As the district court found, "[c]onsistently, these agreements have been based on the National Agreement, but have contained a clause rendering, *inter alia*, the 'Welfare Retirement Clause' of the National Agreement inapplicable."

In 1973 Long and the UMW and District 5, representing the employees, negotiated and signed the last of these renewal contracts, which extended from 1974 into 1976 (the "1973 contract"). Under that contract, as under the previous contracts between Long and the Union, Long contributed to the private health and pension fund rather than to the UMW's national fund. In January 1975, Long's drivers were hauling coal from a mine in Indiana, Pennsylvania, for the Barnes and Tucker Coal Company. In the latter part of that month, these drivers were accosted and stopped on a public road outside the mine by UMW representatives and were forceably prevented from hauling coal from the mine unless Long signed the national agreement with the UMW. Long alleges that the UMW took this action in order to compel it also to make payments into the UMW National Health and Retirement Fund. The trustees of that fund now claim amounts from Long varying from \$.90 per hour for each hour of classified work done by each of Long's employees from February to December 1975, \$1.40 per hour for their work period from December 6, 1975, to December 5, 1976, and \$1.54 per hour for the period from December 1976 to the present. The last renewal agreement, which was still in force at the time the Union compelled Long to sign the national agreement, required sixty days' notice by any party desiring termination. The district court found as a fact that Long never received any notice of termination from the UMW.

12. (Cont'd.)

would be served in creating a dichotomy between retrospective and prospective relief. Moreover, such a distinction would appear to be unrealistic because unless the trustees refrain for some reason from enforcing the employer's promise to contribute to the funds until after the labor agreement has expired, the trustees will invariably combine claims for retrospective and prospective relief.

13. Such risk to the employees' interests may exist, for instance, in the present case. There is no indication in the record that Long's employees are more secure or receive greater benefits under the private pension plan than they would under the UMW program. Indeed, the private arrangements may be wholly inadequate.

Article II of the national agreement, to which Barnes and Tucker is a signatory, provides:

The transportation of coal . . . may be contracted out only to a contractor employing members of the [United Mine Workers of America] *under this Agreement*. (Emphasis supplied.)

Long asserts that the UMW representatives allegedly were enforcing this agreement when they stopped Long's trucks. According to the district court, it was "[d]ue to the intransigence of the UMW and the weight of economic pressure" that Long signed the national agreement. Long, however, continued to pay into the private health and welfare fund under the 1973 agreement with the Union and made no payments into the UMW National Health and Retirement Fund. Two years after Long executed the national agreement, the Trustees instituted this suit.

In my judgment, this case presents the issue whether, in a suit by trustees of a union's pension fund, an employer who is already under an obligation to contribute, and who does contribute, to a private pension fund for his employees may raise defenses showing that he has no duty also to pay the trustees for the same employees. I dissent because I believe that such defenses would be good against the trustees. I would vacate the preliminary injunction ordering Long to pay the trustees and would remand for the district court to consider the defenses.¹

I.

Long's attempt to interpose an antitrust defense raises important issues of policy. Considerations of policy, in my view, favor allowing the defense under the unique facts of this case. As Chief Judge Seitz notes, the Supreme Court,

1. In the absence of factual findings concerning the substance of these defenses, it is unnecessary to reach the interesting question whether the UMW has indeed breached its contractual obligations or violated the antitrust or labor laws.

for reasons of policy, has been reluctant to entertain any contract defense based on alleged violation of the antitrust laws. In *Kelly v. Kosuga*, 358 U.S. 516 (1959), on which the trustees rely, a merchant had contracted to buy fifty cars of onions. Having taken possession of thirteen cars, and having made some payments to the seller, the purchaser repudiated the contract. The seller then sold the remaining cars for the purchaser's account and sued the purchaser for a deficiency caused by a decline in the price of onions. The purchaser raised as a defense that the seller had imposed the contract through a violation of the antitrust laws. The Court barred this defense, but in advancing the reasons for its decision, it chose grounds that, I believe, exclude the instant case. Judge Adams, too, reaches the conclusion "that the policies articulated in *Kosuga* do not appear to preclude consideration of Long's antitrust defense." Conc. Op. at n.1.

First, the Supreme Court cautioned against judicial additions to the express remedies of the Sherman Act. *Id.* at 519. But since the Court reserved a contract defense when "the judgment of the Court would be enforcing the precise conduct made unlawful by the [Sherman] Act," *id.* at 520, this warning should not be interpreted as a prohibition. The warning should be seen in the light of the policies that it serves. Ordinarily, if treble damages are the exclusive remedy for an antitrust violation and the violation cannot serve as a contractual defense, a party with an antitrust claim will resort to court before others detrimentally rely on the party's contractual obligations. In the instant case, however, the district court wrote that "[t]he national agreement was ignored by everyone until this action was filed by the Trustees." The Trustees initiated this suit two years after Long and the UMW signed the contested agreement. The argument based on reliance does not fit the facts of the case.

These considerations mesh with the Court's second reason for the result in *Kosuga*. The Court disapproved

of allowing a party to benefit from a contract that it later renounced as illegal. *Id.* at 519-21. By renouncing the contract, a party could take the benefits of the contract while escaping from its burdens. The purchaser in *Kosuga* accepted some of the onions and later repudiated the contract only when repudiation became convenient.² Here, however, Long does not seek to obtain a benefit without offering a return. Long has continued to pay into a private pension fund, as it had agreed in the 1973 and earlier contracts.

Even if Long might otherwise be able to assert an antitrust defense, the trustees argue that Long cannot raise the defense against them. They base this argument on *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), and *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). But Long does not come within the rationale of either case.

In *Benedict* the trustees of a retirement fund sued a coal company for payments owed to the fund, which was the third-party beneficiary of a contract between the company and the UMW. In defense, the company interposed breaches of that very contract by the UMW. The company argued "that in an amount equal to the amount of damages sustained from the union's breaches, no fund property came into existence." 361 U.S. at 465. The argument, noted the Court, depended upon "whether the agreement is to be construed as making performance by the union of its promises a condition precedent to Benedict's promise to pay royalty to the trustees." *Id.* Construing the contract, the court found no such condition precedent. The instant case is quite different. Here, Long maintains not that the 1975 national contract with the UMW should be construed differently from the one in *Benedict*, but that the instrument itself is invalid as a contract. The construction of the contract in *Benedict* does not govern this case for there is no valid contract for this court to construe.

2. That the price of onions was dropping, 358 U.S. at 519, may explain the repudiation.

Recognizing the distinction between the construction of an admittedly valid contract (as in *Benedict*) and the non-existence of a valid contract, this court has permitted an employer to raise against trustees of a third-party beneficiary pension fund a defense that an ineffective acceptance prevented a contract from coming into existence. *Lewis v. Mears*, 297 F.2d 101 (3d Cir.), *cert. denied*, 369 U.S. 873 (1962). In the fourth circuit, Judge Haynsworth has written:

The rights of the trustees . . . are entirely derivative. Their right to recover contributions from the mine operator is dependent entirely upon the real agreement between the operator and the union. The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and operator, which they may enforce in accordance with its terms, but the fact that the suit is brought for the benefit of the third party beneficiaries would not foreclose a defense that there was no contract

Lewis v. Lowry, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962). But see *Pennington v. UMW*, 325 F.2d 804, 819 (6th Cir. 1963) (dictum that *Benedict* forbids defense of union's duress if raised against trustees for retirement fund), *rev'd as to other portions*, 381 U.S. 657 (1965).

It is of equal importance that Long's success on this defense would not permit it to secure the benefits of a labor agreement while circumventing the burdens. If the set-off claimed by the company in *Benedict* had been granted against the trustees, the company would have avoided, to that extent, paying a part of its employees' agreed compensation. The employees had bargained for the payments, which the company had withheld in response to the union's

conduct. 361 U.S. at 469. Long, however, has paid into the private pension fund in accordance with the requirements of its own employees. It does not seek to avoid compensation owed to its employees; it strives only to save itself from paying twice—once to the private fund, once to the national.

Nor does *Seanor* govern the instant case. Under the UMW agreement involved in *Seanor*, an employer had contracted to pay into a pension fund a royalty of forty cents for each ton of coal mined. The same agreement required an eighty-cent royalty for coal acquired by a signatory from a producer that had not signed the national agreement. It was the imposition of the eighty-cent royalty that allegedly violated the antitrust laws, but the employer raised the alleged antitrust violation as a defense to the trustees' suit for the forty-cent royalties. Unlike Long, the employer had no plausible argument that the whole contract was invalid. In suing only for the forty-cent royalties, the trustees did not open themselves to a possible antitrust defense. Moreover, the court in *Seanor* noted that the employer's defense, if successful, would deprive employees of compensation for which they had rendered services. Again, it should be noted that in this case Long has compensated its employees by paying into the private pension fund

II.

Because Long challenges the validity of the whole contract, and because it has contributed to a private pension fund, it should be permitted to offer a defense that the Union has violated the antitrust laws. To allow an antitrust defense under these narrow circumstances, I believe, will not subvert the protections that *Benedict* extends to the trustees of union pension funds when they sue as third-party beneficiaries. Employees are not likely to suffer privation from the successful interposition of the defense, as is urged by the concurrence, since the employer will have

contributed to a private fund, as negotiated by the union, to which the employees have given their approval in a valid contract. And the configuration of the facts present in the instant case is not likely to recur so as to deplete, by legal fees, the resources of pension funds across the country.

It is true, as Judge Adams observes, that the dispute on which the antitrust defense turns arises out of a purported contract between Long and the UMW, and not between Long and the trustees. But the Union, as the representative of the employees, could protect its interests by intervention in the suit.

If Long proves its antitrust defense, the 1975 contract is unenforceable. *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963). Accordingly, I would remand for the district court to consider Long's proof of the defense.

III.

Long also urges that the UMW has violated sections 8(d) and 8(e) of the National Labor Relations Act ("NLRA") and that the UMW breached its obligations under the 1973 contract. The basis for the defense under section 8(d) is the Union's failure to give sixty days' notice of its intention to terminate the contract. This failure, Long contends, made the national agreement invalid as to it. There is a parallel contractual argument in that the 1973 contract demanded sixty days' notice of termination. Although the outlines of Long's defense under section 8(e) are somewhat unclear, Long evidently argues that because the national agreement contained a "hot cargo" clause, the whole agreement was unlawful.³

The district court held that it had no jurisdiction over the labor law defenses and that the contractual defense of the failure to give termination notice was without merit. Like the district court, I believe that the contractual de-

3. Long appears not to argue that the national agreement was imposed by virtue of a violation of section 8(e).

fense is outside the primary jurisdiction of the NLRB and within the jurisdiction of the district court. The trustees sued under section 301 of the NLRA, and in a suit under that section the district court had jurisdiction to consider even allegations that would, if brought before the Board, establish an unfair labor practice. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962). Here, according to Long, the UMW breached its obligations under the 1973 contract in such a way as to make the 1975 contract invalid. Even if that allegation would make out an unfair labor practice, the district court did not lose its jurisdiction.⁴ On the other hand, I disagree with the district court's conclusion that even if the UMW breached its contractual duties concerning termination, Long waived its rights against the UMW by not asserting the breach until this suit was begun. Because the district court also observed that everyone ignored the 1975 contract until the trustees filed suit, I believe that the facts do not support the theory of waiver. Long had no reason to assert the UMW's breach because before this suit was filed, all of the interested parties treated the second contract as if it did not exist.

Jurisdiction over the NLRA defenses is more problematic, since the district court would need to pass not upon a contractual claim that could also have formed a complaint of an unfair labor practice but upon the argument that an unfair labor practice had in fact been committed. Nonetheless, I would hold that these contentions, raised by way

4. The Trustees have tried to invoke the statute of limitations contained in section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1970), which forbids the issuance of a complaint "based upon any unfair labor practice occurring more than six months before the filing of the charge with the Board." This limitation, argue the trustees, ought also to bar defenses in section 301 suits, even though the limitation refers only to complaints brought before the Board. But the Supreme Court has allowed a litigant to bring a section 301 suit upon allegations that would have constituted an unfair labor practice occurring more than six months before suit. *Smith v. Evening News Association*, 371 U.S. 195, 197 n.5 (1962). Since the purpose of a statute of limitations is to bring possible plaintiffs into court without undue delay and to guarantee the repose of possible defendants, there is even better reason to permit a defense based upon allegations that might otherwise make out an unfair labor practice occurring more than six months before suit was filed.

of defense in section 301 suit, are among "labor law questions that emerge as collateral issues in suits brought under independent federal remedies" and come within the jurisdiction of the district court. *Connell Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 626 (1975).⁵

Since the contractual and section 8(d) defenses go to whether Long owes any obligation at all to the trustees, and since Long has been contributing to a private pension fund, the interposition of these defenses against trustees of a third-party beneficiary union pension fund should be permitted for the same reasons that support the allowance of an antitrust defense in these circumstances. I would therefore remand for the district court to consider whether the Union has breached its contractual obligations or violated section 8(d), so as to make the 1975 contract invalid.

5. Nor does the statute of limitations contained in section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1970), bar this defense. By its own terms, that bar applies to complaints issued by the Board and not to defenses in a section 301 suit. See also n.4 *supra*.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 78-1060

HARRY HUGE, C. W. DAVIS, and PAUL R. DEAN
as Trustees of the United Mine Workers of
America Health and Retirement Funds

vs.

LONG'S HAULING COMPANY, INC., a corporation,
Appellant

(D.C. Civil No. 77-269)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Present: SEITZ, Chief Judge and ADAMS and
ROSENN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record
from the United States District Court for the Western
District of Pennsylvania and was argued by counsel on
September 5, 1978.

27a

On consideration whereof, it is now here ordered
and adjudged by this Court that the judgment of the
said District Court, filed November 8, 1977, be, and
the same is hereby affirmed. Costs taxed against
appellant.

ATTEST:

s/M. Elizabeth Ferguson
Chief Deputy Clerk

December 14, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1060

HARRY HUGE, C. W. DAVIS, and PAUL R. DEAN,
as Trustees of the United Mine Workers of
America Health and Retirement Funds,

Appellees,

vs.

LONG'S HAULING COMPANY, INC.,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS,
GIBBONS, ROSENN, HUNTER,
WEIS, GARTH and HIGGINBOTHAM,
Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

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and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant rehearing in banc.

By the Court,

s/Seitz
Chief Judge

Dated: January 17, 1979

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY HUGE, C. W. DAVIS and :	:	
PAUL R. DEAN, as Trustees of :	:	
the UNITED MINE WORKERS :	:	
OF AMERICA HEALTH AND :	:	
RETIREMENT FUNDS, :	:	
Plaintiff :	:	
vs. :	:	Civil Action
LONG'S HAULING COMPANY, :	:	No. 77-269
INC., a corporation, :	:	
Defendant :	:	

MEMORANDUM

BARRON P. MCCUNE, District Judge
November 8, 1977.

Plaintiffs, Trustees of the United Mine Workers of America Health and Retirement Funds (Trustees) seek a preliminary injunction enjoining defendant, Long's Hauling Company (Long's), from violating the terms of the National Bituminous Coal Wage Agreement of 1974 (National Agreement). Under the terms of the National Agreement, which the Trustees

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seek to enforce, employers who have become bound by the National Agreement are required to make designated payments and reports to the Trustees. The Trustees are third party beneficiaries to the National Agreement.

Long's opposes the Trustees' motion, arguing that the National Agreement is unenforceable due to alleged violations by the United Mine Workers of America (UMW) of §§8(d) and 8(e) of the National Labor Relations Act (NLRA) and alleged violation of §1 of the Sherman Antitrust Act by the UMW and the Trustees. We find that even assuming the truth of the facts underlying these allegations, they are not, as a matter of law, defenses to recovery by the Trustees.

Long's is a corporation engaged in a trucking operation in and about Allegheny County, Pennsylvania, with principal offices in Duquesne, Pennsylvania. Long's employees are, and have been since 1962, represented in collective bargaining by the

UMW, and United Mine Workers of America, District 5 (District 5). During the period in which Long's employees have been represented by the UMW, Long's and District 5 have negotiated several collective bargaining agreements. Consistently, these agreements have been based on the National Agreement, but have contained a clause rendering, inter alia, the "Welfare Retirement Clause" of the National Agreement inapplicable. A supplemental agreement was negotiated, and health and pension benefits were arranged through a private pension fund other than the United Mine Workers of America Health and Retirement Fund. This practice continued until 1975, when Long's signed the 1974 National Agreement without supplement. The circumstances of this signing constitute the substance of Long's defense.

In January of 1975, while hauling coal for Barnes and Tucker Coal Company, Long's employees were stopped by representatives of the UMW. The UMW

representatives informed Long's employees that they could not continue hauling coal from that company until Long's signed the National Agreement.¹ Upon communication by Long's of this ultimatum to District 5, Long's was again told to sign the National Agreement. At no time were the termination requirements of the current collective bargaining agreement between Long's and District 5 complied with by the UMW or District 5. Due to the intransigence of the UMW and the weight of economic pressure, Long's signed the National Agreement without supplement. No unfair labor practice charge was filed at that time or thereafter by Long's. Long's merely ignored the National Agreement, continuing to

-
1. The National Agreement, of which Barnes and Tucker is signatory, contains a clause prohibiting contracting out work to a contractor who is not a signatory of the National Agreement. The UMW representatives were allegedly enforcing this provision.

follow the provisions of the supplemented local agreement, making payments not to the Trustees, but to the pension fund established by the local agreement.

The National Agreement was signed by Long's on February 4, 1975. The National Agreement was apparently ignored by everyone until this action was filed by the Trustees on March 14, 1977, over two years later.

Long's raises three defenses to the Trustees' motion for a preliminary injunction. They assert that the methods used by the UMW constitute a violation of §8(d) of the National Labor Relations Act (NLRA); that the force exerted upon them was due to a "hot cargo" clause in violation of §8(e) of the NLRA; and that the UMW joined with the Bituminous Coal Operator's Association to force operators such as Long's into signing the National Agreement, constituting a violation of §1 of the Sherman Antitrust

Act. A fourth defense, that of noncompliance by the UMW and District 5 with the termination provision of the former collective bargaining agreement, was raised in Long's response but was not briefed. This fourth argument is, however, without merit, since Long's has clearly waived these provisions by waiting over two years to assert them.

We do not reach the merits of Long's argument with respect to NLRA violations. We do not, in an action commencing in this court, have jurisdiction over unfair labor practice charges. Any conduct which is even arguably a §8 violation must first be brought before the National Labor Relations Board (NLRB) before it can be asserted here. San Diego Building Trades Council, etc. v. Garmon, 359 U.S. 236 (1959). Furthermore, even if we had jurisdiction, we could not consider these defenses. Because they are asserted over six months after their occurrence, they are barred by §10(b) of the NLRA. Local Lodge No. 1424 v.

N.L.R.B., 362 U.S. 411 (1960). Long's has not cited, nor are we aware of, any cases which allow defensive use of an unfair labor practice not brought before the NLRB and not brought within six months of its occurrence.

Long's additionally contends that the collective bargaining agreement upon which the Trustees assert their claim was brought about as a result of a violation of §1 of the Sherman Act. We cannot reach the merits of this defense either, for the Trustees are not parties against whom this defense can be raised.

We are bound by the decision of Lewis v. Seanor Coal Company, 382 F.2d 437 (3d Cir. 1967). Seanor presents a factual setting strikingly similar to that which is before us in this action. Seanor Coal, a small coal operator, attempted to invoke the Sherman Act as a defense to a suit for royalty payments brought by trustees of a Taft-Hartley pension fund. Although Seanor was, in the context of a summary judgment

motion, an innocent party, the Circuit determined the antitrust defense to be barred under Kelly v. Kosuga, 358 U.S. 516 (1959). The Circuit interpreted Kosuga to allow defensive use of an antitrust violation only when "the contract price has been inflated because of unlawful price fixing . . ." Because that violation was not present in Seanor, the Trustees prevailed.

Like Seanor, where the permissible antitrust defense was not present, it is not present here. Although Kosuga suggests that the antitrust defense can be used by any innocent party harmed by an agreement, Seanor cannot be so read. Seanor Coal was an innocent party. Seanor was harmed by alleged antitrust violations. Despite these facts, the trustees prevailed in Seanor. Because the Circuit interprets strictly the permissible antitrust defense, the Trustees must also prevail here. Only in an instance where there is an actual price inflation in the contract being sued upon, due to price fixing, could the result be otherwise.

Since there is a strong probability of success on the merits of plaintiffs' claims in this action, and since irreparable harm would result from failure to grant this motion, the Trustees' motion for preliminary injunction will be granted. See Huge v. Old Home Manor, Inc., Civil Action No. 75-1481 (1976).

In granting plaintiffs motion for preliminary injunction, it must be emphasized that we are in no way compromising defendant's counterclaim affirmatively asserting alleged antitrust violations on the part of plaintiffs or others not presently parties to this action.

s/Barron P. McCune
BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: November 8, 1977.

cc: Jack Plowman, Esq.
Plowman & Spiegel
3400 Grant Building
Pittsburgh, Pa. 15219

John J. McLean, Jr., Esq.
Robert A. King, Esq.
Buchanan, Ingersoll, Rodewald, Kyle & Buerger
57th Floor, U.S. Steel Building
600 Grant Street
Pittsburgh, Pa. 15219

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

HARRY HUGE, C. W. DAVIS and	:	
PAUL R. DEAN, as Trustees of	:	
the UNITED MINE WORKERS OF	:	
AMERICA HEALTH AND	:	
RETIREMENT FUNDS,	:	
	:	
Plaintiff	:	
	:	
vs.	:	Civil Action
	:	No. 77-269
LONG'S HAULING COMPANY,	:	
INC., a corporation,	:	
	:	
Defendant	:	

ORDER

AND NOW, November 8, 1977, it is ordered that defendant, Long's Hauling Company, Inc., is directed from this date forward to comply with the terms of the National Bituminous Coal Wage Agreement of 1974, with respect to royalties there required in favor of the United Mine Workers of America Health and Retirement Trusts.

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It is further ordered that defendant is directed to comply with those provisions of the National Bituminous Coal Wage Agreement which require the furnishing of monthly reports to plaintiffs, Trustees of the United Mine Workers of America Health and Retirement Trusts from this date forward.

It is further ordered that defendant Long's Hauling Company, Inc., make available to plaintiffs all records pertaining to hours worked by defendant's employees necessary to determine and verify the amounts paid and/or due and owing to the United Mine Workers of America Health and Retirement Trusts, but only such records pertaining to the period February 4, 1975, to this date.

It is further ordered that the defendant refrain from disposing of assets other than for a fair and adequate consideration and in the ordinary course of business until the final determination of this action or until otherwise ordered.

41a

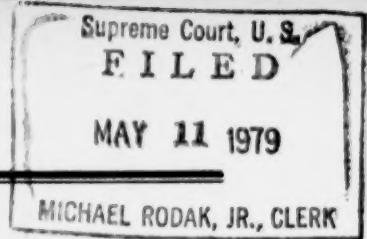
It is further ordered that plaintiffs give security in the form of a corporate surety bond in the amount of \$10,000.00, for payment of such costs or damages as may be incurred or suffered by defendant, in the event it hereafter be determined that defendant was wrongfully enjoined or restrained.

s/Barron P. McCune

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Jack Plowman, Esq.
Plowman & Spiegel
3400 Grant Building
Pittsburgh, PA 15219

John J. McLean, Jr., Esq.
Robert A. King, Esq.
Buchanan, Ingersoll, Rodewald, Kyle
& Buerger
57th Floor, U.S. Steel Building
600 Grant Street
Pittsburgh, PA 15219



**In the
Supreme Court of the United States**

October Term, 1978

No. 78-1566

**LONG'S HAULING COMPANY, INC., a corporation,
*Petitioner,***

v.

**HARRY HUGE, C. W. DAVIS and PAUL R. DEAN,
As Trustees of the United Mine Workers of America
Health and Retirement Funds,
*Respondents.***

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

Brief of Respondents in Opposition

**JACK W. PLOWMAN
PLOWMAN AND SPIEGEL
3400 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 471-8521
*Counsel for Respondents***

Of Counsel:

**E. CALVIN COLUMBIC
WALTER P. O'CONNELL
2021 K Street, N.W.
Washington, D.C. 20006
*Date: May 9, 1979***

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In the
SUPREME COURT OF THE UNITED STATES

No. 78-1566, October Term, 1978

LONG'S HAULING COMPANY, INC., a corporation,
Petitioner,

v.

HARRY HUGE, C.W. DAVIS and PAUL R. DEAN,
as Trustees of the United Mine Workers of
America Health and Retirement Funds,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly set forth in the Petition

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The respondents do not accept the Statement of Question Presented as set forth in the Petition, and in lieu thereof set forth the following:

Whether, in an action to recover contributions due to a health and retirement fund established by a collective bargaining agreement, an employer may assert as a defense violations of Section 1 of the Sherman Act allegedly committed by

the union in negotiating the collective bargaining agreement, and by the trustees of the health and retirement fund, where the employer never raises any objection to the validity of the collective bargaining agreement prior to suit, and the employees have rendered services pursuant to the collective bargaining agreement.

COUNTER-STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the District Court

The basis for federal jurisdiction of this case is section 301 of the Labor Management Relations Act of 1974, as amended, 29 U.S.C. §185, and also section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132.

B. Counter-Statement of Facts

The Petition does not accurately nor fully set forth the pertinent facts in the following respects:

Petitioner's proof as to the collective bargaining agreement relied upon by it as a defense was contradictory, at best. Although there was testimony as to an agreement entered into with the United Mine Workers of America (UMWA) in May of 1974, to extend to May of 1976, no written agreement was offered in proof thereof (R. 71a). This is apparently the agreement referred to on page 11 of the Petition. However, at the trial petitioner introduced into evidence a written agreement entitled "National Bituminous Coal Wage Agreement of 1971" (the "1971 Agreement") dated July 25, 1973 (R. 83a,

196a), which proved that it was not subject to termination prior to November of 1974. The agreement on which respondents based this suit is the "National Bituminous Coal Wage Agreement of 1974" (the "1974 Agreement") (R. 48a, 117a, 181a) which stated that it "supersedes all existing and previous contracts. . ." (R. 169a) Petitioner never disavowed the 1974 Agreement until this suit was filed (R. 118a).

Appended to the 1971 Agreement was an eight page supplement which contained a provision specifically exempting petitioner from making contributions to the UMWA Health and Retirement Funds, which exemption ceased by its terms as soon as petitioner's employees became covered by the UMWA Health and Retirement Plan (R. 33A). And, petitioner's employees became covered upon petitioner's exe-

cution of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") (R. 156a). Thus, the 1971 Agreement relied upon by petitioner contemplated that at some time in the future petitioner's employees would become covered by the UMWA Health and Retirement Plans, at which time petitioner had the right to terminate the private welfare and pension plan. The fact that petitioner did not choose to terminate the private plan could not, of course, relieve petitioner of its obligation to make the contributions it agreed to make in accordance with Article XX of the 1974 Agreement.

At the time petitioner was requested to sign the 1974 Agreement, petitioner attempted to include the same provision exempting petitioner from making contri-

butions to the UMWA Health and Retirement Funds. The UMWA, however, refused to agree to a continuation of the exemption, and despite such refusal petitioner consciously chose to enter into the 1974 Agreement which petitioner knew required it to make the very contributions which respondents seek to recover in this case (R. 116a - 117A).

The 1974 Agreement signed by petitioner also contained the following provision in Article XXVI(b):

"This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference, and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished."

As pointed out by the trial court, petitioner never filed any unfair labor prac-

tice charge in respect to the actions of the UMWA leading up to the signing of the 1974 Agreement, and petitioner never raised any question as to its validity until respondents brought suit to compel petitioner to make the contributions which it agreed, in Article XX of the 1974 Agreement, to make to the UMWA Health and Retirement Funds.

Although the trial court offhandedly observed that the 1974 Agreement was "apparently ignored by everyone," (R. 208a), such is contrary to the record. Respondents were not, of course, parties to the 1974 Agreement, but as trustees they were charged with the enforcement of petitioner's undertaking to make contributions to the Health and Retirement Funds. Within six months of petitioner's signing of the 1974 Agreement, the re-

spondents sent petitioner two letters and one telegram, all requesting petitioner to file its monthly reports and to remit payments in accordance with the 1974 Agreement (R. 49a-55a, 182a), but petitioner ignored the requests (R. 52a, 184a). Finally, respondent's associate legal counsel called petitioner's President, who stated that he would have petitioner's legal counsel call respondents, but no such call was ever received. (R. 55a). Judge Rosenn, in his dissenting opinion (Pet. 24a) apparently relied on the District Court's unsupported observation in saying that petitioner had not waived its rights by failing to renounce the 1974 Agreement.

Nor was the 1974 Agreement ignored

by petitioner's employees. A grievance was filed by petitioner's employees in March of 1976, complaining, inter alia, of petitioner's failure to make contributions to the UMWA Health and Retirement Funds (R. 185a). And, of course, petitioner has always deducted union dues in accordance with the 1974 Agreement. (R. 120a) At no time prior to petitioner's filing of its answer did petitioner ever deny the validity of the 1974 Agreement (R. 118a, 120a).

Although petitioner's answer pleaded that the UMWA's purpose in insisting that petitioner sign the 1974 Agreement was to enforce a provision which, petitioner argues, prohibited any signatory from subcontracting any coal hauling to any non-signatory, petitioner did not offer

any evidence or proof whatever in support of that allegation, apparently being content to rely on the language of the provision itself to establish illegality.

Petitioner's statement, that "the UMWA's purpose in forcing Long to sign the 1974 National Agreement was to enforce Article II by restricting subcontracts for the transportation of coal to signatories of that Agreement" (Pet. 14) is simply not borne out by the record. First, no proof was offered by petitioner and the Court did not find, any "force" exerted upon petitioner. There is nothing in the record that would establish any activity by the UMWA other than would be normally incident to negotiation of a collective bargaining agreement, which fact is further established by peti-

tioner's never filing any unfair labor practice charge in respect to the 1974 Agreement (Pet. 33a).

It is remarkable that, although petitioner called an employee of Barnes & Tucker Coal Company (the producer for which petitioner was hauling coal) to testify, petitioner neither asked the witness nor presented any other proof that the particular contract provision of which petitioner complains was ever invoked by the UMWA as to Barnes & Tucker. Thus, there is a complete absence of proof in the record that petitioner's execution of the 1974 Agreement was in any way related to the UMWA's agreement with Barnes & Tucker, a fact that was certainly crucial to petitioner's antitrust defense.

Contrary to petitioner's representation that its employees received no benefits from the 1974 Agreement (Pet. 15, 16), under the terms of the 1974 Agreement petitioner's employees became immediately entitled to all of the benefits available to the employees of any other signatory to the 1974 Agreement, namely hospitalization, death benefits, and accrual of pension benefits (R. 55a, 160a). The footnote statement of page 16 of the Petition, to the effect that petitioner's employees would be required to "work a minimum of ten years . . . in order to receive any benefits from [the Health and Retirement Funds]" is a misrepresentation of the record. While an employee does need a minimum of 10 years in order to be entitled to retirement bene-

fits, each year of work for a signatory (whether with petitioner or some other signatory), is accrued toward eligibility, i.e., is "portable." (R. 58a, 59a) And, while earning retirement benefits petitioner's employees and his dependents were eligible for hospital and medical care benefits, and his family was eligible, in the event of his death, for Widow and Survivor's Benefits, all from the very day petitioner became a signatory to the 1974 Agreement. (R. 55a, 63a, 160a)

The decision of the trial court, which was affirmed by the Court of Appeals, granted respondents' request for a preliminary injunction requiring petitioner to comply with the terms of the 1974 Agreement. The 1974 Agreement has, since the entry of the trial court's

order, expired by its own terms (R. 169a), and petitioner is not a signatory to the successor agreement. The trial court's decision expressly recognized that its order did not preclude petitioner from its counterclaim against plaintiffs based upon alleged antitrust violations (Pet. 33a).

REASONS FOR NOT GRANTING THE WRIT

The decision of the Court of Appeals is wholly consistent with prior decisions of this Court denying an employer the right to raise, as a defense to an action to enforce the terms of a collective bargaining agreement, alleged illegal conduct on the part of a union in the course of contract negotiation. This policy has been followed so as to not deprive the employees (all of whom must be presumed

innocent of any wrongdoing) of the just compensation due them for their labor.

It should be borne in mind that the respondents did not negotiate the collective bargaining agreement. Rather, respondents are the trustees¹ of the UMWA Health and Retirement Funds established by the collective bargaining agreement to further compensate the employees through a Hospital and Medical Care program, death benefits for surviving spouses and dependents, and pensions for retired employees who attain the required service with any one or more of over 21,000 signatory employers. (R. 47a)

Although petitioner argues (Pet. 18)

1. The collective bargaining agreement provided for three trustees, one appointed by the employers, one by the UMWA, and one "neutral" trustee chosen by the other two. (R. 47a, 159a)

that the Courts have permitted a defense that no collective bargaining agreement was intended by the parties, the cases relied upon by petitioner do not support this proposition. In Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), the Court ruled that an employer could prove by parol evidence that the union had not accepted the contract, while in the present case petitioner has freely admitted that it chose to sign the 1974 Agreement, knowing that its request for deletion of the provision requiring contribution to the health and retirement funds was unacceptable to the UMWA (R. 115a). An employer cannot unilaterally pretend to enter into a collective bargaining agreement so as to prevent strikes and then, when full liability under the agreement is asserted,

seek to disaffirm it. Lewis v. Cable, 107 F. Supp. 196 (W.D. Pa. 1952). Similarly, Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962) held that where both parties do not intend a collective bargaining agreement to be effective, the parol evidence rule does not preclude proof that neither party intended to make an agreement. But following remand, summary judgment was granted to the trustees, the Court of Appeals affirmed, holding that an employer could not, even if there were a misrepresentation by the union negotiator, remain silent. Absent a prompt renouncing of the collective bargaining agreement, the employer was obligated to make contributions to the UMWA Health and Retirement Funds. Lewis v. Lowry, 322 F.2d 453

(4th Cir. 1963). But here petitioner does not contend even that it did not intend to enter into an agreement, and never did renounce the 1974 Agreement, but simply argues that it should not be held to make the contributions to the UMWA Health and Retirement Funds required by the 1974 Agreement.

The decisional law of this Court, and that which was followed by both the District Court and the Court of Appeals, is that an employer should not be permitted to set off against its employees any defense arising out of the conduct of a union in the negotiation of implementation of a collective bargaining agreement. Essentially, the reasoning has always been that to allow such defenses would be to punish the employee, by depriving the

employee of earned compensation, for the faults of the union representatives whose acts are the subject of the alleged defenses. See, e.g., Lewis v. Benedict, 361 U.S. 459 (1960); Lewis v. Seanor, 382 F.2d 437 (3d Cir.), cert. denied, 390 U.S. 947 (1967).

A. An Alleged Violation of the Antitrust Laws by a Union is Not a Defense to the Enforcement of Trustees' Rights to Have Contributions Made to Health and Retirement Funds Created by a Collective Bargaining Agreement

As pointed by the Court of Appeals' decision, (590 F.2d at 459), this Court has not favored antitrust based defenses to otherwise valid contracts. Kelly v. Kosuga, 358 U.S. 516 (1959). The reasons underlying this policy are, two-fold. First is an unwillingness to allow a party to obtain the advantages of a con-

tract while disavowing its obligations or, as stated in the words of Mr. Justice Holmes, to prevent people "from getting other people's property for nothing when they purport to be buying it." Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 271 (1909). Second, the Sherman Act itself gives an injured party treble damages in the event of a proven violation, and the judiciary has been reluctant to add to that already harsh sanction a policy of non-enforcement of contracts when such policy is not provided for in the Sherman Act. Kelly v. Kosuga, supra.

Lewis v. Benedict, 361 U.S. 459 (1960), held that an employer cannot escape its obligation to make payments to the trustees of the health and retirement

funds because of the union's conduct. In Benedict the employer asserted as a defense the alleged breach of the collective bargaining agreement by the union. Mr. Justice Brennan, in holding such a defense to be ineffective as to the trustees, observed that the trustees had not negotiated the agreement and had made no promises, and hence were not in breach. The Court held:

"Benedict promised in the collective bargaining agreement to pay a specified scale of wages to employees. It would not be contended that Benedict might recoup its damages by decreasing these wages. . . . the covenant to pay wages is included in separate contracts of hire entered into with each employee. The royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought to be incorporated into the individual contracts." 360 U.S. at 469

While the Court of Appeals observed that the trustees in this case "seek to enforce [petitioner's] promise prospectively as well as retrospectively," such is no longer the case. Subsequent to the entry of the lower court's preliminary injunction, the collective bargaining agreement to which petitioner was a party has expired by its own terms. (R. 169a, Art. XXX)

Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947(1968), involved the identical situation as exists in this case. Seanor argued, as petitioner does here, that the collective bargaining agreement violated the Sherman Act, and that such violation relieved it of its contractual duty to pay royalties to the trustees of the wel-

fare and retirement funds. The defense was rejected as a matter of law, the Court holding:

"it is particularly requisite in a case such as this not to allow the possible invalidity of a provision which is not operative as to these parties to afford a basis for non-compliance with a valid obligation, for the Supreme Court has pointed out that royalty payments into a welfare fund which are bargained for have the characteristics of compensation to the workers for their services." 382 F.2d at 440, 441.

The particular defense before the Court in the Seanor case was that one of the provisions in the collective bargaining agreement was a "hot cargo clause." The Court concluded that the remedy argued by the employer was not a defense to the Trustees' action:

"The company's claim that the agreement violates the Sherman Anti-trust Act is not a defense to the Trustee's action. It is now well established that the remedy for violation of the anti-trust law is not avoidance of payments under a contract, but rather the redress which the anti-trust statute establishes, - a private treble damage action. Kelly v. Kosuga, 358 U.S. 516 ... (1959); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743... (1947)." 382 F.2d at 441

See also, Mullins v. Reitz Coal Co., U.S. District Court, D. C., Civil Action No. 78-715; Mullins v. Kaiser Steel Corp., U.S. District Court, D.C., Civil Action No. 78-0650; United States Steel Corp. v. UMWA, U.S. District Court, D.C., Civil Action No. 75-1966

Petitioner has argued (Pet. 23) that the respondents were parties to some illegal conspiracy, but offered no proof of

this whatever at the trial.² Nowhere in the record did petitioner offer any proof that it entered into the 1974 Agreement because of the provision of which it now complains. But even if such were the case (which it is not), no reason exists why the penalty for such should be placed on petitioner's employees, which is what petitioner effectively seeks to accomplish

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2. Petitioner, in footnote 5, page 14, states that the provision relied upon by it to establish illegality has already been held to be illegal, citing UMW, Local 1554 (Amax Coal Co.), 23 NLRB No. 214(1978). That decision is presently pending an appeal to the United States Court of Appeals for the Third Circuit at Docket No. 78-2489. Provisions of this type have been generally held valid where work preservation purposes exist. National Woodwork Mfrs. Assoc. v. N.L.R.B., 386 U.S. 612(1967); Larry V. Muko, Inc. v. Trades Council, 47 U.S.L.W. 2129 (3d Cir. 8/11/78); Sheet Metal Workers International Assoc. v. N.L.R.B., 498 F.2d 687 (D.C. Cir. 1974)

by depriving its employees of so much of their compensation as is in the form of royalties used to purchase hospitalization, death benefits, and retirement pensions. Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962). If an improper provision, the clause is severable from the balance of the 1974 Agreement (R. 169a, Art. XXX). Lewis v. Mill Ridge Coals, Inc., following the Benedict decision, rejected the contention that a failure of consideration resulted from the alleged misconduct of the Trustees, stating:

"A fair reading of Benedict discloses the Court's purpose to give the ultimate beneficiaries of the welfare fund (the men who mined the coal and their dependents) a status that would insulate them from the consequences of a breach of the contract by either the

Mine Workers Union, as promisee, or the trustees of the Fund, as fiduciaries, charged with administration of the fund." 298 F.2d at 557

See also, United States v. Carter, 353 U.S. 210 (1957), where this Court held that the "labor agreements not only created" the obligation "to make the specified contributions, but simultaneously, created the right of the trustees to collect those contributions on behalf of the employees. . . .The Trustees stand in the shoes of the employees and are entitled to enforce their rights." 353 U.S. at 220.

Petitioner seeks a holding that the door should be opened to a whole series of new antitrust type defenses in actions to enforce an employer's duty to make contributions to its employees' welfare

funds. However, the federal courts have fashioned a body of substantive federal labor law which has precluded employers from doing just that, albeit not to petitioner's liking.

B. The Decisions of the District Court and the Court of Appeals are Consistent With Those of This Court and of Other Courts

Petitioner argues (Pet. 20) that this Court has consistently, allowed the assertion of an antitrust violation as a defense in a contract action, citing Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227 (1909). On the contrary, the Continental Wall Paper Co. case "is the only action on a contract in which the Supreme Court has sustained the defense of antitrust illegality." Comment, "The Defense of Antitrust Illegality in Contract Actions," 27 U. Chi.

L. Rev. 758, 761(1960)³

The Continental Wall Paper Co. case, on which petitioner relies, is most noted for Mr. Justice Holmes' dissenting opin-

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3. The cases cited in petitioner's footnote as authority for its proposition do not support it. Kelly v. Kosuga, 358 U.S. 516(1959) (contract of sale separable from antitrust-violating agreement; defense denied); Bruce's Juices, Inc. v. Am. Can. Co., 330 U.S. 743(1947) (Robinson Patman violation no defense to action on notes given in connection with sale of goods); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir.), cert. denied, 419 U.S. 1050(1974) (antitrust defense not available in action to enforce contract which did not further prohibited activities); Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207, 210 (3d Cir., 1962), cert. denied, 372 U.S. 929 (1962) (defense allowed in action to recover share of profits resulting from breach of antitrust laws); Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766 (6th Cir. 1960), reversed, 365 U.S. 320 (1961) (lower court decision that contract violated Clayton Act, and hence was unenforceable, reversed).

ion, in which he stated that "the policy of not furthering the purposes of the [agreement in restraint of trade] is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it." 212 U.S. at 270,71. The same policy, so well enunciated in dissent, applies here where petitioner received the benefit of the entire 1974 Agreement, from its signing to its expiration, and now seeks to avoid payment of a portion of the compensation bargained for on behalf of petitioner's employees, namely the contributions to the health and retirement funds managed by the respondents.

The decision of the Court of Appeals and of the District Court simply follows,

with little or no extension, the reasoning of Lewis v. Benedict, 361 U.S. 459 (1960), Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947(1968) and Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962). The holding of those cases is that a claim which an employee may have against a union or the trustees of the Health and Retirement Funds is not a defense to a claim which is, in substance, to recover compensation due to employees. Petitioner's employees should not be punished for the alleged sins of the union negotiators nor for the alleged sins of the trustees in violating the antitrust laws. If a violation of the antitrust laws has been committed by them, the union or the trustees are amenable to the harsh sanctions of treble damages imposed

by those laws.

While the concurring opinion of Judge Adams observes that Kelly v. Kosuga, 358 U.S. 516(1959), would "seem" not to preclude the assertion of an anti-trust defense here, the observation was not only not part of the Court's decision affirming the District Court, but was clearly unjustified in the statement that the petitioner received no quid pro quo for its undertaking to make contributions to the health and retirement funds. Judge Adams did not explain why he felt a quid pro quo was lacking, but there was certainly as much consideration moving to the petitioner for the 1974 Agreement as there is in respect to any other collective bargaining agreement.

The proof of petitioner was contradictory as to the collective bargaining agreement on which petitioner relied. Although there was testimony that petitioner had entered into an agreement with the UMWA in May of 1974, which was to extend to May of 1976 (R. 71a), no written agreement was offered into evidence, and hence such must be disregarded under section 302(e)(5), 29 U.S.C. §186(c)(5), of the Labor Management Relations Act. Lewis v. Seanor Coal Co., 382 F.2d 437, (3d Cir.), cert. denied, 390 U.S. 947(1967). Petitioner later (R. 83a) introduced into evidence a written agreement dated July 25, 1973 (R. 196a), which provided that it was not subject to termination prior to November of 1974. The 1974 Agreement on which the respondents based this suit

was executed by petitioner in February, 1975 (R. 117a, 181a), which Agreement stated that it "supersedes all existing and previous contracts except as incorporated and carried forward herein. . . ." (R. 169a, Art. XXVI §9b)). Petitioner never disavowed the 1974 Agreement until this suit was filed. (R. 118a) Hence, to the extent any inconsistency existed between the agreements, the most recent agreement, the 1974 Agreement, would control. Bechtel Corp. v. Local 215, Laborers' International Union, 544 F.2d 1207 (3d Cir. 1976).

Petitioner urges that this case differs from Lewis v. Benedict and Lewis v. Seanor Coal Co., because, according to the petition (p. 22), in neither Benedict nor Seanor did the employee have

a plausible argument that the whole collective bargaining agreement was invalid, stating that in both Benedict and Seanor the effect of allowing the defense would have been to deny petitioner's employees part of the compensation for their services. This is nonetheless true here. The sine qua non essential to this petitioner's argument is lacking, namely, wrongdoing on the part of the employees who will be affected by a ruling allowing the defense of an alleged violation of the antitrust laws.⁴

4. Petitioner offered no evidence whatever that the petitioner executed the 1974 Agreement because of any illegal action of respondents, nor on the part of the union. The only possible basis for such an assertion on the record is that the UMWA (not the respondents) had not given 60 days' notice prior to the union's

(fn. cont'd)

Petitioner executed the 1974 Agreement with full knowledge that it would be required to make contributions to the health and retirements established by the collective bargaining agreement. (R. 117a). Petitioner was content to accept the labor peace that followed as a result of signing the 1974 Agreement and never, ever, raised any objection to it until this suit was filed. A threat of a strike is a lawful instrument. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184(1921). The

(fn. cont'd)

insistence that petitioner execute the then-current National Bituminous Coal Wage Agreement of 1974. Petitioner apparently abandoned such argument and the District Court held that the defense of failure to give 60 Days' notice had been waived or, if not waived, was barred by §10 of the National Labor Relations Act. (Pet. 35a)

threat of a strike cannot be used to avoid a contract, and does not constitute duress. Shipley v. Pittsburgh and L.E.R.R., 83 F. Supp. 722 (W.D. Pa. 1949)

Now, after the petitioner's employees have rendered their services, and after the 1974 Agreement has expired by its own terms, petitioner seeks to disavow its obligation to make the contributions not because of anything supposedly done by the persons who are to benefit from those contributions, but because of some allegedly improper conduct, never proven, on the part of the UMWA negotiators, or because of some unspecified improper conduct by the respondents, as trustees of the health and retirement funds. Under all principles of estoppel, petitioner should not be permitted to now renounce

the burdens of a collective bargaining agreement of which it enjoyed the benefits for nearly three years. Lewis v. Lowry, 322 F.2d 453 (4th Cir. 1963)

The decisional law of this Court, and of the other courts of the federal system, have consistently refused to allow as a defense the allegedly improper conduct of a union in negotiating a collective bargaining agreement in an action to recover contributions due to a health and welfare fund created in the collective bargaining agreement for the benefit of the employees.

Conclusion

An action brought by the trustees of a health and retirement fund is not the appropriate setting for the litigation of petitioner's claims of alleged violations

of the antitrust laws by the UMWA and the respondents, nor for the alleged commissions of unfair labor practices by the UMWA. The antitrust laws allow the recovery of treble damages for their violations, and the National Labor Relations Act provides specific remedies for an employer injured by unfair labor practices.

No sound reason exists as to why an employer should be given a further sanction in the form of a set off against, or avoidance of, contributions due to the employees, to fund health and retirement funds created exclusively for the benefit of petitioner's employees and the employees of other signatories. In the words of Chief Judge Seitz, in writing the opinion of this case in the Court of Appeals for the Third Circuit:

"The rule that Long seeks would allow any plaintiff to bootstrap itself into a position to litigate in district court claims within the NLRB's primary jurisdiction simply by adding unrelated antitrust allegations." 590 F.2d at 461

The petition for writ of certiorari should be denied.

Respectfully submitted

Jack W. Plowman
Plowman and Spiegel
3400 Grant Building
Pittsburgh, PA 15219
(412) 471-8521
Counsel for Respondents

Of Counsel:

E. Calvin Golumbic
Walter P. O'Connell
2021 K Street NW
Washington, DC 20006